85-1616

Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

TRANS RENT-A-CAR, INC.,
Petitioner,

v.

THE HERTZ CORPORATION and
NATIONAL CAR RENTAL SYSTEM, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the *Noerr-Pennington* doctrine immunizes private decisions (1) to offer high minimum concession guarantees to airports in order to foreclose entry by smaller competitors and in turn (2) to agree privately to fix rates for pro forma approval by the airport authorities.

2. Whether a Court of Appeals decision to sustain a summary judgment conclusion of *Noerr-Pennington* immunity on the previous question may be made on the basis of an issue specifically excluded from consideration by the moving party.

PARTIES

The caption of this Petition contains the names of all parties to this action in the Ninth Circuit. Trans Rent-A-Car is an affiliate of Alamo Rent-A-Car, Inc.; The Hertz Corporation is a subsidiary of UAL, Inc. and National Car Rental Systems, Inc. is a subsidiary of Household International.

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THE HERTZ CORPORATION and
NATIONAL CAR RENTAL SYSTEM, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Trans Rent-A-Car, Inc. (Trans) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit, attached as Appendix A, is reported at 766 F.2d 1292. The other opinions below are unreported and are reproduced in Appendices B and C.

JURISDICTION

The initial opinion of the Ninth Circuit was filed on July 22, 1985. A timely petition for rehearing was filed and on October 7, 1985 the initial opinion was withdrawn and a new opinion filed. Another timely petition for rehearing was filed and on January 9, 1986 the pe-

tition was denied. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal.

STATEMENT OF THE CASE

This case involves the intersection of two issues, one substantive and one procedural, currently plaguing the lower federal courts. The substantive issue is whether *Noerr-Pennington*[1] immunizes a horizontal conspiracy to fix prices and prevent competitive entry into the on-airport rental car market. The procedural issue arises under Rule 56 of the Federal Rules of Civil Procedure, governing the issuance of summary judgments. In particular, does Rule 56 allow the Ninth Circuit *sua sponte* to excise, on statute-of-limitation grounds that the defendants expressly chose not to present to the court, important deposition testimony demonstrating the clear existence of a dispute about a material fact? It was only because of this excision that the court could affirm a summary judgment finding that the market exclusion and price fixing indeed came within *Noerr-Pennington*.

The background to this case is the dominance by three companies—Hertz, Avis, and National—of the rental car market at our Nation's airports. In 1975 the Federal Trade Commission filed a charge complaining that their 96% share of that lucrative market was the result of

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[1] *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

unfair competition. The evidence adduced in the FTC proceeding indicated in part that Hertz, Avis, and National had conspired together (1) to convince local airports to limit the number of rental car concessionaires thereby facilitating (2) setting rates among themselves and then taking the agreed-upon rate to the local airport authority for ratification.

Although Hertz, Avis and National each signed a consent cease and desist order with the FTC, that proceeding spawned numerous civil antitrust suits against the three. These were consolidated in the Northern District of California and when Trans filed its complaint in early 1979 it was consolidated with the then-pending cases.[2] Following a necessary substitution of judges, the defendants renewed a motion for summary judgment (which did not include Trans). Judge Schwarzer granted the motion, concluding that with respect to the airports in Washington and Oregon all the defendants' activities were protected by *Noerr-Pennington*.

The Ninth Circuit affirmed and this Court denied certiorari. *Budget Rent-A-Car v. Hertz*, 693 F.2d 84 (CA 9 1982), *cert. denied*, 462 U.S. 1133 (1983).[3] Subsequently all suits were settled except Trans' against Hertz and National. Following lengthy procedural wrangling over whether or not Trans could conduct additional discovery past December 31, 1977,[4] the defendants successfully

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[2] Unlike the other plaintiffs, however, Trans alleged the defendants were engaged, in part, in a price-fixing conspiracy part and parcel of which was the systematic exclusion of smaller rental car companies from on-airport concessions. Complaint @ 13, 17-20.

[3] No issue of horizontal price-fixing was presented in *Budget*. 693 F.2d at 85-86 n.1.

[4] This is best exemplified by the Hearing on October 7, 1983 which takes 78 pages to transcribe. On page 18 Judge Schwarzer is reminded that there has been a motion by plaintiffs to compel pending for 35 months. On page 36 he states that to deny additional discovery "is just to invite reversible error." Yet by the

moved for summary jugment. Judge Schwarzer found *Noerr-Pennington* covered most of defendants' conduct and that Trans lacked standing to complain of price fixing since it was not a customer of the defendants. Trans appealed.[5]

Wholly avoiding the *Noerr-Pennington* issues, the Ninth Circuit affirmed 2-1:

> Trans has presented *no relevant* evidence to support its allegations that the defendants prevented it from obtaining concessions at airports by fixing prices, bribing and making misrepresentations to airport officials, or denying Trans access to decision-making authorities. As in *Budget*, we therefore need not reach the question of whether or not the conduct alleged by Trans is protected from antitrust scrutiny by the *Noerr-Pennington* doctrine (Emphasis supplied)

A reviewing court sits *de novo* on issues of summary judgment; thus there is no problem with affirming the decision below on alternative grounds. 10 Wright, Miller, & Kane, Federal Practice & Procedure: Civil 2d § 2716 (1983). And if there was "no relevant evidence" to support the allegations, then the panel quite properly ended this protracted litigation. The problem, however, is that the court was demonstrably wrong.

All airport rental-car concession agreements require the concessionaire to pay to the airport the higher of either 10% of the concessionaire's gross or a specified minimum guarantee. The key ingredient in defendants' conspiracy was the setting of minimum guarantees so high that small companies could not meet them and yet sufficiently low

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end of the Hearing he invited defendants to submit a motion for summary judgment that would preclude further discovery. When the defendants did so, he granted it.

[5] There were several substantive issues in the appeal, but only the horizontal conspiracy to fix prices and exclude from the market are cert worthy.

so that the conspirators could meet them without financial risk. This in turn made possible the price-fixing conspiracy of the defendants.

The evidence of horizontal price fixing and market exclusion that Trans relied on consisted primarily of deposition testimony of Gene Nelson, a former National employee, and George Akoboff, a former employee of a National licensee.[6] Nelson's testimony explained how the three were successful in accomplishing their objects. They would meet in private and agree to offer the airport a minimum guarantee so high that "a small operator" would "realize he couldn't afford this." But Hertz, Avis, and National always could. When Nelson was asked whether "increased minimums have had any effect on the actual fees paid by Hertz, Avis, and National," he responded, "never." (Nelson Deposition 4:5-5:25)

The reason was simple: "at these meetings we compared our revenue. National being nationally known as number three therefore having the lowest revenue factors in the terminal, we [the conspirators] based our increase to the minimum at the lowest factor of our [National's] revenue." The three would privately go over revenue "to establish amongst us that it would not hurt National being penalized in the event revenue was below based minimum." (*Id.*) Nelson was asked if "raising the minimum guarantee" was "an effective way of keeping additional car rental operations off the airport." He answered: "It was effective." (Nelson Deposition p. 17 4:5, 16-18)

The sole purpose of the exclusionary activities was to perpetuate Hertz', Avis', and National's shared monopoly of on-airport concessions to protect their parallel price-fixing scheme. Both Nelson and Akoboff testified that representatives of the three met in private to set rates to be

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[6] The testimony as filed with the District Court is reproduced in Appendices E and F.

rubber-stamped by the airport authorities. Nelson stated the agreements would then be hidden from the authorities by a different company publicly asking for the agreed-upon rate increase. "And the remaining two would fall in line with their rate increase within a 90-day period." (Nelson Deposition p. 107:2-108:24) Akoboff testified these private meetings to set prices were held "all throughout the United States." Hertz was "always afraid of the Justice Department, and they had mentioned that several times to me." When asked what he meant by being afraid, Akoboff stated, "Well, that they were controlling the rates, fixing the rates." He then named Howard Burns, a Hertz Vice-President, as the person expressing Hertz' fears. And how did Akoboff know all these things? "Because I was a member of the licensee advisee committee and these subjects were brought up every three months." (Akoboff Deposition p. 35:8-24)

In sum, Trans' evidence showed secret meetings where Hertz, Avis, and National agreed to set uniform on-airport car rental rates and use their shared monopoly to exclude smaller competitors. Just how could this testimony not be "relevant"?

Only if it were not part of the case. *Sua sponte* Judges Choy and Ferris held that Nelson's and Akoboff's depositions were not filed with the District Court in accordance with Rule 30(f) of the Federal Rules of Civil Procedure. Therefore, they were not "on file" under Rule 56(c) and the District Court could not properly consider them.

Trans immediately filed a petition for rehearing pointing out that Local Rule 220-7 of the Northern District of California required the procedure followed below. In response, defendants argued that they were "unable to find any indication that the Northern District of California ever intended to supplant the filing requirements of the federal rules with its own local rules." Without citation to the record, defendants went on to state that, in any event, the testimony of Nelson and Akoboff related to

events occurring before February 14, 1975 and therefore was time-barred by the statute of limitations.

The panel then issued a new 2-1 decision that is virtually a verbatim replication of its earlier opinion, but omitting reliance on Rules 30(f) and 56(c). The panel now held there was "no relevant evidence" supporting Trans' price fixing and market exclusion claims because, picking up on defendants' suggestion, all the evidence was barred by the statute of limitations. Again, a reviewing court can rely on alternative grounds, and, as *Wells v. Rockefeller*, 728 F.2d 209 (CA 3 1984) shows, a reviewing court can independently make differing dispositions on statute of limitations questions from those of a District Court on a summary judgment question. *If* the defendant raises the issue.

While the defendants snuck a reference to time-barred into their brief on the merits and opposition to rehearing [7] they specifically excluded the statute of limitations from

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[7] Because there were two motions for rehearing, there were three sets of briefs filed before the Ninth Circuit. A look at defendants' three briefs is most revealing. *Brief 1*: Their primary theory was that Trans was relitigating *Budget*. In that brief there was a single sentence reference to Nelson's, and only Nelson's, testimony being time-barred. *Brief 2*: Defendants' second brief argues Trans should have complied with *both* Rule 30(f) and Local Rule 220-7 as the latter could not have been intended to supersede the former. This time there was a larger suggestion, to include Akoboff, of time-barred testimony. *Brief 3*: Their final brief then asserts "the trial court agreed with the defendants that certain evidence related to matters and incidents that were well outside the period of the statute of limitations and, therefore, should not be considered. In short, the trial court found that the plaintiff had produced no admissible or probative evidence within the limitations period to take defendants' conduct outside the protection of the *Noerr-Pennington* doctrine." If this is so, it is nothing short of amazing that it took four of America's best law firms three briefs to get it on paper. Of course, it is not so: Defendants did not—*because they can not*—cite to a single word in Judge Schwarzer's opinion supporting that assertion. See also, note 4 *supra* for why the statute of limitations was avoided by the defendants.

their motion for summary judgment. At page 6, footnote 3 of that motion, they state:

> The instant motion is based solely on *Noerr-Pennington* considerations. Although we believe that we have a substantial basis for summary judgment on other grounds—*e.g.*, the statute of limitations—we are not presenting those grounds here . . .

Why? "[B]ecause to do so would require us to burden the Court with extensive evidentiary materials."

They were not kidding. Trans filed its complaint within four years of the FTC Complaint and Trans' complaint alleged the conspiracy had been fraudulently concealed thereby tolling the statute of limitations. Had the defendants argued the limitations issue to the district court, Trans would have offered abundant proof of both concealment and continuing conspiracy in response.[8]

The panel thus ducked for a second time the *Noerr-Pennington* horizontal price-fixing and market exclusion issues. Both times it did so by excluding all Trans' evidence and then reaching the *a fortiori* conclusion there was "no relevant evidence" to support plaintiff's claim. The first time it relied on the Federal Rules; the second time it relied on an affirmative defense eschewd by the defendant. Trans again moved for reconsideration, but this time the panel stuck with its opinion.[9]

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[8] As the defendants' motion for summary judgment shows, they relied "solely" on the pure *Noerr-Pennington* issue. Trans responded with the best testimony. Had a statute of limitations issue been raised, Trans not only had the tolling issue, but other testimony cumulative to (although less focused than) Nelson's and Akoboff's and lacking the supposed time problem.

[9] The primary thrust of Hertz' brief on the merits was that the prior *Budget* decision was wholly dispositive of Trans' appeal. If that were the case, the panel had to have had an uncontrollable urge to make Rule 56 law rather than simply affirm on the basis of *Budget*.

Trans has thus spent seven years in court without getting its day in court. It is difficult to imagine the litigant who could successfully anticipate the procedural minefield set by a panel seemingly convinced that the relevant evidence should vanish no matter what. Even in the bygone era of hyper-technicalities there were rules that allowed a litigant a chance.

REASONS FOR GRANTING THE WRIT

A recent article in the Georgetown Law Journal notes that the volume of *Noerr-Pennington* litigation in the lower courts is both "substantial" and, more significantly, "rapidly accelerating." [10] This should not be surprising: the interrelationship of government and business has made *Noerr-Pennington* issues increasingly important and increasingly present.

Last term this Court decided *Southern Motor Carriers Rate Conference v. United States*, 105 S.Ct. 1721 (1985), but the disposition of the case made it unnecessary to reach the question of whether *Noerr-Pennington* immunized horizontal price-fixing issue even though this was one of the two issues on which certiorari had been granted. *Id.* at 1725 n.11 and 1726 n.17.[11] That issue is present in the instant case. The motion for summary judgment that Judge Schwarzer first encouraged and then granted holds that private conspiracies (1) to agree on rates and then take the agreed upon rates to the relevant authorities for a rubber stamp approval and (2) to ex-

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[10] Hurwitz, *Abuse of Governmental Process, the First Amendment, and the Boundaries of Noerr*, 74 Georgetown LJ 65, 67 (1985).

[11] This Court has also just heard argument in *Square D v. Niagara Frontier Tariff Bureau*, No. 85-21 (760 F.2d 1347 (CA 2 1985)) on the related issue of *Keogh* immunity. *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922). *Keogh* immunity, however, was sparked by issues of Congressional intent, not First Amendment activities to influence governmental decision-making.

clude other would-be competitors from market entry by high payments from the agreed upon rates is conduct protected by the *Noerr-Pennington* doctrine. Since a reviewing court on an issue of summary judgment may affirm or reverse on any grounds available to the district court, the *Noerr-Pennington* issue is available for review on this record.

Noerr-Pennington is about First Amendment rights to influence public policy. As the Court stated in *Noerr*, "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." 365 U.S. at 135. But that has nothing to do with the facts of this case. Trans did not lose out in a legitimate competitive struggle. Rather the defendants secretly met and agreed to set uniform rental rates to subsidize their agreed-upon super-high guaranteed minimum payments to airport authorities. This is no attempt to obtain a governmental restraint. It is a classic privately agreed-upon restraint of trade. Nothing changes because one of its features, the agreed upon minimum guarantees, benefits the government and another, price-fixing, obtains the acquiescence of government. When the lower courts protect such conspiracies, they should be informed in no uncertain terms that the limits of *Noerr-Pennington* have been exceeded.

Finally, the procedure below simply compounds the error of the extension of *Noerr-Pennington* immunity beyond justifiable bounds. Defendants have never disputed their illegal conspiracy. Their position is that despite its illegality it is immunized by *Noerr-Pennington*, and the District Court has so held. Instead of reviewing this decision the Ninth Circuit has twice gone off on a frolic of its own with Rule 56. Indeed its final position in effect told the plaintiffs they should have understood that the exclusion of the statute of limitations from the summary judgment motion could not bind an appeals court feeling it necessary to substitute its judgment for that

of defendants' lawyers. It was as if the Ninth Circuit panel had decided to copy the Missouri Supreme Court in *Brinkerhoff-Faris v. Hill*, 281 U.S. 673 (1930) and held against the plaintiff for its failure to read, far in advance, the appellate court's mind.

CONCLUSION

The issue of immunity under the antitrust law, whether *Noerr-Pennington* or *Keogh*, is substantial, as this Court's grants of certiorari in *Southern Motor Carriers Conference* and *Square D* indicate. It is present on the face of the District Court's summary judgment and certiorari should be granted to decide this question. Alternatively, should this Court decide that in its current posture this case is not an appropriate vehicle for deciding the *Noerr-Pennington* issue, this Court should summarily reverse the statute of limitations Rule 56 holding of the Ninth Circuit for further proceedings below.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 84-1778

DC No. CV 79-0285-WWS
(MDL 338)
(Northern California)

IN RE: AIRPORT CAR RENTAL ANTITRUST LITIGATION

TRANS RENT-A-CAR, INC.,
Plaintiff-Appellant,
v.

THE HERTZ CORPORATION, *et al.*,
Defendants-Appellees.

[Filed Oct. 7, 1985]

ORDER

Before: CHOY, FARRIS, and BEEZER, Circuit Judges.

The opinion and dissent filed July 22, 1985, are withdrawn and the attached opinion and dissent are ordered filed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA. No. 84-1778

DC No. CV 79-0285-WWS
(MDL 338)

IN RE: AIRPORT CAR RENTAL ANTITRUST LITIGATION

TRANS RENT-A-CAR, INC.,
Plaintiff-Appellant,

v.

THE HERTZ CORPORATION, *et al.*,
Defendants-Appellees.

[Filed Oct. 7, 1985]

Appeal from the United States District Court
for the Northern District of California
Honorable William W. Schwarzer,
District Judge, Presiding
Argued and Submitted January 16, 1985—
San Francisco, California
Withdrawn from submission February 28, 1985
Resubmitted May 3, 1985

OPINION

Before: CHOY, FARRIS, and BEEZER, Circuit Judges.

FARRIS, Circuit Judge:

BACKGROUND

Trans Rent-A-Car, Inc. brought this antitrust action against Hertz Corp., Avis Rent-A-Car System, Inc., and National Car Rental System, Inc., alleging that the defendants had conspired to monopolize and to exclude Trans from the "on-airport car rental market" in violation of sections one and two of the Sherman Act, 15 U.S.C. §§ 1 and 2. Trans' action was consolidated with ten similar actions into a single multidistrict litigation. Avis settled with all of the plaintiffs in the consolidated cases. Subsequently, we affirmed a summary judgment in favor of Hertz and National in one of the consolidated cases, ruling that the plaintiff (Budget Rent-A-Car of Washington-Oregon, Inc.) had presented only evidence of conduct that was exempt from the antitrust laws under the *Noerr-Pennington*[1] doctrine. *In Re Airport Car Rental Antitrust Litigation*, 693 F.2d 84 (9th Cir. 1982) (*"Budget"*), *cert. denied*, 462 U.S. 1133, 103 S. Ct. 3114, 77 L.Ed.2d 1368 (1983). Hertz and National filed a motion for summary judgment in the remaining cases. With the exception of Trans, all of the remaining plaintiffs settled with Hertz and National. The district court granted the defendants' motion for summary judgment in the *Trans* case. We have jurisdiction over Trans' appeal pursuant to 28 U.S.C. § 1291.

Trans alleges that as part of a nationwide conspiracy to monopolize the "on-airport car rental market," the defendants prevented Trans from obtaining on-airport car

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[1] *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L.Ed. 2d 464 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 13 L.Ed. 2d 626 (1965).

rental concessions at a number of airports in the western United States. Trans contends that the defendants excluded it from those airports through conduct that is not protected by the *Noerr-Pennington* doctrine: bribing airport officials, making bad-faith misrepresentations to them, fixing prices and submitting them to airport authorities for summary approval, and denying Trans access to the decision-making process of airport authorities. *Cf. Budget*, 693 F.2d at 85-86 n.1 (plaintiff's allegations of such conduct, which "*Noerr-Pennington* might not protect," were insufficient to prevent entry of summary judgment in favor of defendants because plaintiff "presented no evidence to support [its] allegations").

The parties took extensive discovery in the consolidated actions. After Trans filed suit in February, 1979, more than 150 witnesses were deposed, including public officials and employees and ex-employees of the defendants. The defendants objected to and never answered the interrogatories filed by Trans on October 7, 1980. However, Trans never moved either to compel answers to its interrogatories or for the imposition of discovery sanctions against the defendants.

After the plaintiff indicated its intention to appeal the district court's grant of summary judgment in the *Budget* case, the court stayed the proceedings in the remaining consolidated cases. We denied Trans' petition for a writ of mandamus compelling the court to lift the stay. After we decided the *Budget* case, Trans informally requested the district court to lift the stay to allow it to complete discovery on the issues raised in the instant appeal. The court responded in a letter dated December 1, 1982 that it opposed a general lifting of the stay because of the possibility of Supreme Court review of our decision in *Budget*. The court indicated, however, that it would consider particularized discovery requests, such as a request to depose a particular individual, if they were supported by a showing of the basis for believing that the

discovery would produce material evidence and the reasons why delay would result in prejudice. Trans then formally moved for an order vacating the stay. The court denied the motion on February 3, 1983 because the plaintiff in *Budget* still had the opportunity to petition the Supreme Court for a writ of certiorari and because Trans had not submitted any particularized discovery requests in accordance with the court's December 1 letter.

At a status conference held on October 7, 1983, the district court extensively addressed the issue of discovery. In an effort to limit discovery to the issues presented in the defendants' motions for summary judgment, the court instructed counsel for the plaintiffs to 1) address the merits of the motions on the facts presented by the defendants, and 2) identify issues that required additional discovery, identify the evidence the party expected to produce, and prepare an appropriate discovery program. Trans failed to make a particularized request for additional discovery before the court granted the defendants' motion for summary judgment on March 16, 1984.

STANDARDS OF REVIEW

"The granting of a summary judgment is reviewable de novo." *Haluapo v. Akashi Kaiun, K.K.*, 748 F.2d 1363, 1364 (9th Cir. 1984). "In reviewing a grant of summary judgment, our task is identical to that of the district court. The district court's grant of summary judgment will be affirmed if, viewing the evidence and the inferences therefrom in the light most favorable to the party opposing the motion for summary judgment, there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law." *RFD Publications, Inc. v. Oregonian Publishing Co.*, 749 F.2d 1327, 1328 (9th Cir. 1984). "[S]ummary judgment may be appropriate in antitrust actions when there is no 'significant probative evidence tending to support the complaint.'" *Robert's Waikiki U-*

Drive, Inc. v. Budget Rent-A-Car Systems, Inc., 732 F.2d 1403, 1406 (9th Cir. 1984) (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290, 88 S. Ct. 1575, 1593, 20 L.Ed 2d 569 (1968)).

A district court's "decision to allow or deny discovery is reviewable only for abuse of discretion." *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984).

I. *Noerr-Pennington* Doctrine

Trans' case suffers from the same defect that was fatal to the plaintiff's case in *Budget*: Trans has presented no relevant evidence to support its allegations that the defendants prevented it from obtaining concessions at airports by fixing prices, bribing and making misrepresentations to airport officials, or denying Trans access to decision-making authorities. As in *Budget*, we therefore need not reach the question of whether or not the conduct alleged by Trans is protected from antitrust scrutiny by the *Noerr-Pennington* doctrine.

A. *Price Fixing; Misrepresentations; Bribery and Coercion*

Trans cites five depositions of former employees of the defendants and the transcript of the testimony of one of those five ex-employees before the Federal Trade Commission in support of its allegations of price fixing, misrepresentations, and bribery and coercion. To the extent that the depositions of Tom Aiston, W. Paul Ayres, and Fred Bailey and the transcript of Bailey's testimony before the FTC relate to airports from which Trans alleges it was illegally excluded, they concern causes of action that are time-barred. Aiston and Ayres last worked for Hertz in the western United States in 1969 and 1966, respectively. Bailey last worked for National in 1970 Trans filed its complaint on February 14, 1979. Causes of action accruing to Trans before February 14, 1975

are barred by the statute of limitations. 15 U.S.C. § 15b; *Program Engineering, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188, 1194 (9th Cir. 1980). "A cause of action accrues each time a plaintiff is injured by an act of the defendants." *Id.* Aiston, Ayres, and Bailey had no first-hand knowledge of acts of the defendants relating to the airports in question that took place within the limitation period. Trans' conclusory allegations of fraudulent concealment of the alleged antitrust violations are insufficient to avoid the bar of limitation. *See Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978).

Similarly, the two depositions which supposedly substantiate Trans' allegations of "bad faith misrepresentations" to airport officials refer only to events which occurred prior to the actionable limitation period. George Akoboff, an employee of a National licensee, testified only about actions in 1969. Gene Nelson testified only about actions which occurred before he left his position with a National licensee in 1973. These depositions do not demonstrate first-hand knowledge of acts within the applicable limitation period.

B. *Foreclosure of Access to Airport Officials*

The only deposition that was before the district court when it entered judgment that relates to actions of the defendants at a relevant airport within the limitation period is that of Trans' Chief Executive Officer, Seymour Furman. Trans cites Furman's deposition in support of its allegation that the defendants prevented Trans from gaining access to the decision-making process at various airports, thereby placing Trans at a disadvantage in competing for on-airport concessions.

Furman's deposition contains absolutely no evidence that the defendants did anything to prevent Trans from meeting with, submitting concession bids to, or otherwise contacting airport authorities. Trans complains that

Hertz, Avis, and National met privately with airport officials in Phoenix to advocate limiting the number of on-airport concessions to four. In *Budget*, we explicitly held that such advocacy was protected by the *Noerr-Pennington* doctrine. 693 F.2d at 85, 87. Furman's deposition reveals not that Trans was prevented from presenting its case to Phoenix airport authorities but rather that Trans realized the need to do so only after its competitors had engaged in legitimate lobbying activity and the governing body had decided to award only four on-airport concessions. Nothing in Furman's deposition or in any other portion of the record suggests that the defendants were responsible for Trans' alleged failure to receive a bid package from the Port of Portland for a concession at the Portland International Airport.

II. *Discovery*

The district court's decision at the October 7, 1983 status conference to keep its stay of discovery proceedings in effect and to permit further discovery only upon a particularized showing of both need and the evidence likely to be produced was a reasonable limitation that properly reflected both the extensive amount of discovery that had taken place and the possibility that the plaintiffs would need additional discovery in response to our decision in *Budget*. The court clearly and repeatedly informed counsel for the plaintiffs that to obtain court approval for additional discovery, they would have to identify the issues upon which they desired further discovery, identify the evidence they expected to produce, and propose a discovery program. Trans' counsel raised no objection to this proposed procedure. Trans' formal motion to lift the stay did not comply with the procedure outlined at the status conference. The district court's refusal to grant Trans further discovery in these circumstances was not an abuse of discretion.

AFFIRMED.

BEEZER, Circuit Judge, dissenting:

I respectfully dissent. On the basis of the record before us, I cannot conclude that the defendants satisfied the requirements for the granting of a summary judgment set forth in Federal Rule of Civil Procedure 56.

Rule 56(c) states that a summary judgment shall be rendered forthwith if the evidence in the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The burden rests upon the moving party to show the *absence* of a genuine issue of material fact, rather than upon the nonmoving party to show the *existence* of such an issue. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 159-60 (1970); *International Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1405 (9th Cir. 1985); Fed. R. Civ. P. 56(e). The nonmoving party has no duty to produce evidence unless the moving party has met its burden. *Lew v. Kona Hospital*, 754 F.2d 1420, 1423 (9th Cir. 1985). In antitrust actions, the burden on the moving party is especially great. *See Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1050 (9th Cir.), *cert. denied*, 104 S.Ct. 156 (1983).

Applying those standards, it is apparent that the defendants have not established the absence of a genuine issue of material fact. Accordingy, I would reverse the granting of the summary judgment and remand for a trial on the merits regardless of whether the plaintiff has produced evidence in support of its allegations.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE: THE HONORABLE WILLIAM W. SCHWARZER, JUDGE

Master File No. MDL 338

Civil No. C-79-0285-WWS

IN RE AIRPORT CAR RENTAL ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

TRANS RENT-A-CAR, INC.,
Plaintiff,

vs.

THE HERTZ CORPORATION, *et al.*,
Defendants.

REPORTER'S TRANSCRIPT

Friday, March 16, 1984

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* * * *

[10] THE COURT: Well, it's my intention to render an oral opinion at this time. I see no need for additional written opinions. So my opinion will be on the record here and in the transcript, and you can do with it as you wish.

The first issue, of course, is the issue of discovery, and whether plaintiff Trans should be entitled to take

further discovery before the motion is considered and decided. Now, the record shows that the actions of the other plaintiffs were filed beginning in 1975; Trans did not file its action until 1979. But the bulk of the discovery in this case appears to have occurred after Trans filed its complaint; and therefore, it was open to Trans to participate in the discovery.

And as Mr. Shestack points out, there were almost 180 depositions taken after Trans entered into the case, including many depositions of defendant employees and public officials, as well as other discovery. Trans was entitled to participate in all that discovery. Not only that, it was entitled to receive—and I am sure it did—receive the product of that discovery.

[11] In addition to that, that discovery that took place during that period after Trans came in dealt with all of the airports in which Trans was interested, with the exception of three airports. And so the information that would be relevant to Trans' case would necessarily have been developed in the case of all but three of the airports by the discovery taken by the parties. So if there was any evidence likely to be available in support of claims of Trans, it would have been developed by the other plaintiffs in this litigation, and would surely be before us now.

Now, Trans also argues that the court denied its request to conduct discovery after the court of appeals' decision in the Budget of Washington case when this court had issued a stay; and by reason of this court's refusal to lift the stay, Trans was deprived of its right to conduct discovery.

Now, that is a basic statement of the record. And I think it's important to set the record straight.

In November 1982, the Ninth Circuit affirmed this court's summary judgment. Trans then asked this court to lift the stay to pursue discovery.

On December 1, 1982, the court sent a letter to Mr. Scarpulla and Mr. Shestack acknowledging the request by Trans to lift the stay. The court said that it was not disposed to grant a general lifting of the stay because the appeal had not been concluded. I went on to say the court will, however, [12] consider any application for permission to conduct discovery such as a deposition of a particular individual supported by a showing of the basis for believing that that discovery will produce probative evidence on any of these remaining three issues under the Ninth Circuit decision, and grounds why delay will result in prejudice.

The court heard nothing from Mr. Scarpulla in response to that letter except for the filing of a formal motion to lift the stay.

In response to that motion, the court issued an order on February 3, 1983, and that order states in part:

"Trans now moves for an order vacating the stay. The appeal is not yet concluded inasmuch as Budget Rent-A-Car of Washington and Oregon may yet petition for writ of certiorari. The stay will therefore remain in effect because Trans made no application of the type invited by the court in its letter of December 1, 1982. It will not be excepted from the stay."

And that's where the matter remained. There were no requests for any particularized kind of discovery, nor was there ever any motion to compel answers to the earlier interrogatories.

Now, on October 7, 1983, a status conference was held in this matter by the court, at which we established the schedule for motions for summary judgment. During the discussion at that conference, the court specifically noted that [13] if any of the plaintiffs wished to conduct specific discovery made necessary by the defendant's motion, they would be given time to do so pursuant to particularized requests, and no requests were received.

Finally, with respect to Trans' argument that the defendants should be required to respond to the October 1980 interrogatories, those interrogatories on the whole do not appear to be directed to the more pending issues which are now before the court. As I said, if that interest in answers to those interrogatories were serious, it should have been raised by a motion to compel. None was ever filed.

So it seems to the court that the conclusion is inescapable that the arguments concerning discovery are really a smoke screen to obscure the absence of any factual support for the position taken by Trans, notwithstanding the lengthy, and thorough and extensive discovery that has already been conducted by various parties.

Now, passing on to the merits of the motion itself, the most notable fact really about Trans's opposition may be that it is almost wholly devoted to rearguing the basic Noerr-Pennington issues that were previously decided by this court on which summary judgment was granted and affirmed.

The issue now before the court is really very narrow, and that is: whether Trans has raised a triable issue concerning conduct by defendants not protected by Noerr-
[14] Pennington as enunciated in footnote 1 to the Ninth Circuit opinion. And specifically, that conduct might take one or more of four forms. Either bribing airport officials, making bad faith representations, submitting illegally fixed prices for summary approval by airport officials, or being baseless lawsuits. There isn't any claim here concerning baseless lawsuits, and that can be put aside.

Now, with respect to the matter of bribery, the antitrust laws don't prohibit and don't provide a remedy or relief based on bribery. In the context of this action, the gravamen of this action is plaintiff's alleged exclusion

from airports by the joint actions of defendants to influence airport officials. The issue is whether defendants by the use of bribery or other illegal methods so corrupted the decision-making process that they lose the benefit of the Noerr-Pennington exemption, which entitles them to enjoin action to influence airport officials. That reasoning is found in the district court opinion in *Rangin versus Sterling Nelson*, which is affirmed by the court of appeals.

Moreover, the evidence of bribes, so-called, as a part of the defendant's alleged exclusionary conduct, must be such that a trier of fact could find that that conduct had an effect, the effect being of inducing added competitive action in the form of exclusion of the plaintiffs. That is, there must be some evidence of a causal relationship between the [15] alleged bribes and some anticompetitive impact generated by the defendants directly or indirectly.

The evidence here is wholly insufficient to meet those tests. What it indicates is that the defendants occasionally provided an airport manager with a complimentary rental car; they sent them some free gifts as Christmas presents; there were some parties in which women participated as hostesses. And Mr. Scarpulla now points out some references to some amounts of money which are vague and general, and which I don't find in the brief or in the references to the record.

In any case, those kinds of activities can't be characterized as anything other than courtesies, goodwill, the usual kind of commercial effort to generate and enhance mutually-profitable relationships. There is no evidence here of bribes being passed in order to influence decisions, or decisions having been influenced as a result of bribery action.

Second, with respect to misrepresentations, what has been said about bribery and the analysis, it's appropriate it applies equally here. The antitrust laws don't prescribe fraud or misrepresentation. That kind of conduct is actionable as part of an antitrust offense only if it's shown to have been anticompetitive in purpose and effect.

In the context of the joint efforts to influence public officials, the test again is whether the misrepresentations, whatever they were, could have been found to have been [16] so profound and material and influential that they could be said to have corrupted the process of decision making so that the protection for that process and for joint action to influence it is forfeited.

The only evidence here that I am able to discern from what's been presented is that the defendants are said to have provided information to airport officials addressing the prospective effect of additional car rental licenses on the airport, whether it would increase or decrease the amount of business that would be generated and the revenues to the airport.

Now, apparently the information presented purported to show that there would be no benefit, and perhaps a loss, to airports by admitting additional licensees. The information appears to have been in essence a kind of a traffic analysis on projection. And apparently, it was a subject of dispute at the time. It was not a representation of that that was false and known to be false, nor is there any evidence to indicate that anybody relied on the information presented in making a decision. And it's not claimed that these statistics that were submitted and the projections were said to have had any added competitive effect.

The most that could be said of them is that they were self-serving hyperbole. They couldn't be found to have corrupted the decision-making process under the circum-

stances [17] shown. Application of the Noerr-Pennington doctrine, it seems can't be made to turn on an after-the-fact examination of traffic projections and their accuracy given many years earlier.

Finally, with respect to the matter of price fixing, again this is not an action by consumers or purchasers against vendors or suppliers for fixing prices that they were charged. Trans is not a customer of the defendant, and has no standing to complain about prices that were charged to their customers.

Now, if the allegations here are true, and assume them to be true, Trans presumably was a beneficiary of the allegedly increased prices agreed upon by the defendants, which served to provide some sort of an umbrella under which Trans could operate.

Price is relevant to this action insofar as it bears upon the charge that the defendants conspired to exclude the plaintiff from airports. But as far as one is able to determine from the papers before the court, price enters into this litigation in just two ways. First, price discussions relate to the charges made by the airports to the licensees, that is, the defendants. The joint action of the defendants to influence the airports with respect to the terms of lease, including the prices charged by the airport to the licensees, is immunized under the prior decision and is not an issue here.

Now, secondly, price relates to the matter of what the licensees would charge their customers at the airport. Now, [18] there does appear to be attention here. The airports had an interest in maximizing the payments to them by the concessionaires under the lease. And to that end, the airports had an interest in having the licensees charged rates sufficient to enable them to pay the highest possible rental payments.

At the same time, the airports had an interest in keeping the prices to customers as low as possible so that the

airport would generate as much car rental business as possible. So the car rental companies, the licensees, put in that position, of course, attempted to maximize their profits from car rental business, and at the same time to minimize the amounts of lease payments that they had to pay to the airports.

So the sum and substance of all this is that the rental charges for cars were an integral part of the relationship between the licensees and the airports; and it was inescapable that they would be discussing the subject of rental charges at the airport because they related directly to the charges made by the airport for the privilege of doing business at the airport.

So it seems to me that all that the evidence adds up to here concerning discussions concerning car rental rates is a matter which is directly related to the subject of leasing space at the airports and influencing the airport authorities to extend the most favorable terms to the licensees; the terms including not simply the straight rental payments, but also [19] the conditions under which the rental company would operate, including the charges to the public. So this was all part of the ongoing relationship between the defendants and the airports; and hence, in that context would be protected activity.

Therefore, it can't be said that the price activity standing alone could be considered an anticompetitive scheme intended to exclude the plaintiffs as such.

Summing it all up, it seems to the court the plaintiff has not come forward with any facts that could raise a triable issue on the question of whether the defendants have forfeited the Noerr-Pennington exemption by illegal or corrupt conduct that would cause that exemption to be forfeited. In the absence of any triable issue of fact or any evidence that would raise a triable issue of fact,

the defendant's motion for summary judgment should be granted, and it will be granted.

So if you will submit a form of judgment, Mr. Shestack, I will sign it.

MR. SHESTACK: We will prepare that promptly, Your Honor.

THE COURT: Is there anything further to come before the court? If not, we will stand in recess.

[Proceedings Concluded]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 84-1778

DC No. CV 79-0285-WWS
(MDL 338)

IN RE: AIRPORT CAR RENTAL ANTITRUST LITIGATION

TRANS RENT-A-CAR, INC.,
Plaintiff-Appellant,
v.

THE HERTZ CORPORATION, *et al.*,
Defendants-Appellees.

[Filed July 22, 1985]

Appeal from the United States District Court
for the Northern District of California
Honorable William W. Schwarzer,
District Judge, Presiding
Argued and Submitted January 16, 1985—
San Francisco, California
Withdrawn from submission February 28, 1985
Resubmitted May 3, 1985

OPINION

Before: CHOY, FARRIS, and BEEZER, Circuit Judges.

FARRIS, Circuit Judge:

BACKGROUND

Trans Rent-A-Car, Inc. brought this antitrust action against Hertz Corp., Avis Rent-A-Car System, Inc., and National Car Rental System, Inc., alleging that the defendants had conspired to monopolize and to exclude Trans from the "on-airport car rental market" in violation of sections one and two of the Sherman Act, 15 U.S.C. §§ 1 and 2. Trans' action was consolidated with ten similar actions into a single multidistrict litigation. Avis settled with all of the plaintiffs in the consolidated cases. Subsequently, we affirmed a summary judgment in favor of Hertz and National in one of the consolidated cases, ruling that the plaintiff (Budget Rent-A-Car of Washington-Oregon, Inc.) had presented only evidence of conduct that was exempt from the antitrust laws under the *Noerr-Pennington*[1] doctrine. *In Re Airport Car Rental Antitrust Litigation*, 693 F.2d 84 (9th Cir. 1982) (*"Budget"*), *cert. denied*, 462 U.S. 1133, 103 S. Ct. 3114, 77 L.Ed.2d 1368 (1983). Hertz and National filed a motion for summary judgment in the remaining cases. With the exception of Trans, all of the remaining plaintiffs settled with Hertz and National. The district court granted the defendants' motion for summary judgment in the *Trans* case. We have jurisdiction over Trans' appeal pursuant to 28 U.S.C. § 1291.

Trans alleges that as part of a nationwide conspiracy to monopolize the "on-airport car rental market," the defendants prevented Trans from obtaining on-airport car

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[1] *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L.Ed. 2d 464 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 13 L.Ed. 2d 626 (1965).

rental concessions at a number of airports in the western United States. Trans contends that the defendants excluded it from those airports through conduct that is not protected by the *Noerr-Pennington* doctrine: bribing airport officials, making bad-faith misrepresentations to them, fixing prices and submitting them to airport authorities for summary approval, and denying Trans access to the decision-making process of airport authorities. *Cf. Budget*, 693 F.2d at 85-86 n.1 (plaintiff's allegations of such conduct, which "*Noerr-Pennington* might not protect," were insufficient to prevent entry of summary judgment in favor of defendants because plaintiff "presented no evidence to support [its] allegations").

The parties took extensive discovery in the consolidated actions. After Trans filed suit in February, 1979, more than 150 witnesses were deposed, including public officials and employees and ex-employees of the defendants. The defendants objected to and never answered the interrogatories filed by Trans on October 7, 1980. However, Trans never moved either to compel answers to its interrogatories or for the imposition of discovery sanctions against defendants.

After the plaintiff indicated its intention to appeal the district court's grant of summary judgment in the *Budget* case, the court stayed the proceedings in the remaining consolidated cases. We denied Trans' petition for a writ of mandamus compelling the court to lift the stay. After we decided the *Budget* case, Trans informally requested the district court to lift the stay to allow it to complete discovery on the issues raised in the instant appeal. The court responded in a letter dated December 1, 1982 that it opposed a general lifting of the stay because of the possibility of Supreme Court review of our decision in *Budget*. The court indicated, however, that it would consider particularized discovery requests, such as a request to depose a particular individual, if they were supported by a showing of the basis for be-

lieving that the discovery would produce material evidence and the reasons why delay would result in prejudice. Trans then formally moved for an order vacating the stay. The court denied the motion on February 3, 1983 because the plaintiff in *Budget* still had the opportunity to petition the Supreme Court for a writ of certiorari and because Trans had not submitted any particularized discovery requests in accordance with the Court's December 1 letter.

At a status conference held on October 7, 1983, the district court extensively addressed the issue of discovery. In an effort to limit discovery to the issues presented in the defendants' motions for summary judgment, the court instructed counsel for the plaintiffs to 1) address the merits of the motions on the facts presented by the defendants, and 2) identify issues that required additional discovery, identify the evidence the party expected to produce, and prepare an appropriate discovery program. Trans failed to make a particularized request for additional discovery before the court granted the defendants' motion for summary judgment on March 16, 1984.

STANDARDS OF REVIEW

"The granting of a summary judgment is reviewable de novo." *Haluapo v. Alaska Kaiun, K.K.*, 748 F.2d 1363, 1364 (9th Cir. 1984). "In reviewing a grant of summary judgment, our task is identical to that of the district court. The district court's grant of summary judgment will be affirmed if, viewing the evidence and the inferences therefrom in the light most favorable to the party opposing the motion for summary judgment, there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law." *RFD Publications, Inc. v. Oregonian Publishing Co.*, 749 F.2d 1327, 1328 (9th Cir. 1984). "[S]ummary judgment may be appropriate in antitrust actions when there is no 'significant probative evidence tending to sup-

port the complaint.'" *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc.*, 732 F.2d 1403, 1406 (9th Cir. 1984) (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290, 88 S. Ct. 1575, 1593, 20 L.Ed 2d 569 (1968)).

A district court's "decision to allow or deny discovery is reviewable only for abuse of discretion." *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984).

I. *Noerr-Pennington* Doctrine

Trans' case suffers from the same defect that was fatal to the plaintiff's case in *Budget*: Trans has presented no relevant evidence to support its allegations that the defendants prevented it from obtaining concessions at airports by fixing prices, bribing and making misrepresentations to airport officials, or denying Trans access to decision-making authorities. As in *Budget*, we therefore need not reach the question of whether or not the conduct alleged by Trans is protected from antitrust scrutiny by the *Noerr-Pennington* doctrine.

A. *Price Fixing; Misrepresentations; Bribery and Coercion*

Trans cites five depositions of former employees of the defendants and the transcript of the testimony of one of those five ex-employees before the Federal Trade Commission in support of its allegations of price fixing, misrepresentations, and bribery and coercion. The two depositions supposedly substantiating Trans' allegations of "bad faith misrepresentations" to airport officials, those of Gene Nelson and George Akoboff, were not filed with the district court in accordance with Rule 30(f) of the Federal Rules of Civil Procedure. Because those depositions were not "on file," Fed. R. Civ. P. 56(c), the district court could not properly have considered them, and we may not consider them on appeal. *See Daiflon, Inc.*

v. Allied Chemical Corp., 534 F.2d 221, 226-27 (10th Cir.) (court of appeals did not consider deposition that had not been filed with district court in accordance with Rule 30(f) or statements of counsel in appellate brief relating to that deposition), *cert. denied*, 429 U.S. 886, 97 S. Ct. 239, 50 L.Ed.2d 168 (1976). *See also United States v. Walker*, 601 F.2d 1051, 1054-55 (9th Cir. 1979).

To the extent that the depositions of Tom Aiston, W. Paul Ayres, and Fred Bailey and the transcript of Bailey's testimony before the FTC relate to airports from which Trans alleges it was illegally excluded, they concern causes of action that are time-barred. Aiston and Ayres last worked for Hertz in the western United States in 1969 and 1966, respectively. Bailey last worked for National in 1970. Trans filed its complaint on February 14, 1979. Causes of action accruing to Trans before February 14, 1975 are barred by the statute of limitations. 15 U.S.C. § 15b; *Program Engineering, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188, 1194 (9th Cir. 1980). "A cause of action accrues each time a plaintiff is injured by an act of the defendants." *Id.* Aiston, Ayres, and Bailey had no first-hand knowledge of acts of the defendants relating to the airports in question that took place within the limitation period. Trans' conclusory allegations of fraudulent concealment of the alleged antitrust violations are insufficient to avoid the bar of limitation. *See Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978).

B. *Foreclosure of Access to Airport Officials*

The only deposition that was before the district court when it entered judgment that relates to actions of the defendants at a relevant airport within the limitation period is that of Trans' Chief Executive Officer, Seymour Furman. Trans cites Furman's deposition in support of its allegation that the defendants prevented Trans

from gaining access to the decision-making process at various airports, thereby placing Trans at a disadvantage in competing for on-airport concessions.

Furman's deposition contains absolutely no evidence that the defendants did anything to prevent Trans from meeting with, submitting concession bids to, or otherwise contacting airport authorities. Trans complains that Hertz, Avis, and National met privately with airport officials in Phoenix to advocate limiting the number of on-airport concessions to four. In *Budget*, we explicitly held that such advocacy was protected by the *Noerr-Pennington* doctrine. 693 F.2d at 85, 87. Furman's deposition reveals not that Trans was prevented from presenting its case to Phoenix airport authorities but rather that Trans realized the need to do so only after its competitors had engaged in legitimate lobbying activity and the governing body had decided to award only four on-airport concessions. Nothing in Furman's deposition or in any other portion of the record suggests that the defendants were responsible for Trans' alleged failure to receive a bid package from the Port of Portland for a concession at the Portland International Airport.

II. *Discovery*

The district court's decision at the October 7, 1983 status conference to keep its stay of discovery proceedings in effect and to permit further discovery only upon a particularized showing of both need and the evidence likely to be produced was a reasonable limitation that properly reflected both the extensive amount of discovery that had taken place and the possibility that the plaintiffs would need additional discovery in response to our decision in *Budget*. The court clearly and repeatedly informed counsel for the plaintiffs that to obtain court approval for additional discovery, they would have to identify the issues upon which they desired further discovery, identify the evidence they expected to produce,

and propose a discovery program. Trans' counsel raised no objection to this proposed procedure. Trans' formal motion to lift the stay did not comply with the procedure outlined at the status conference. The district court's refusal to grant Trans further discovery in these circumstances was not an abuse of discretion.

AFFIRMED.

BEEZER, Circuit Judge, dissenting:

I respectfully dissent. On the basis of the record before us, I cannot conclude that the defendants satisfied the requirements for the granting of a summary judgment set forth in Federal Rule of Civil Procedure 56.

Rule 56(c) states that a summary judgment shall be rendered forthwith if the evidence in the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The burden rests upon the moving party to show the *absence* of a genuine issue of material fact, rather than upon the nonmoving party to show the *existence* of such an issue. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 159-60 (1970); *International Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1405 (9th Cir. 1985); Fed. R. Civ. P. 56(e). The nonmoving party has no duty to produce evidence unless the moving party has met its burden. *Lew v. Kona Hospital*, 754 F.2d 1420, 1423 (9th Cir. 1985). In antitrust actions, the burden on the moving party is especially great. *See Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1050 (9th Cir.), *cert. denied*, 104 S.Ct. 156 (1983).

Applying those standards, it is apparent that the defendants have not established the absence of a genuine issue of material fact. Accordingly, I would reverse the granting of the summary judgment regardless of whether the plaintiff has produced evidence in support of its allegations.

The record reveals, however, that the plaintiff quoted extensively from the depositions of Gene Nelson and George Abokeff in its trial brief. Those quotations raised triable issues of fact. While it is true that those depositions are not contained in the record, it would have been permissible for the district court to take judicial notice of the contents of the depositions. *See* Fed. R. Evid.

201(b); *cf. Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977) (per curiam) (taking judicial notice of Coast Guard records). It is well settled that a district court may take judicial notice of facts in deciding whether a summary judgment is appropriate. *See* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2723, at 66-72 (1983). Moreover, neither the defendants nor the district court objected to the use of the quotations. In the absence of a timely objection to the plaintiffs' use of the quotations, it is inappropriate to raise this issue *sua sponte* on appeal. If a timely objection had been filed in the district court, the plaintiff could have either filed the depositions or introduced the quotations through affidavits.

In sum, I would reverse the granting of the summary judgment and remand for a trial on the merits.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 84-1778

DC #CV 79-0285-WWS
(MDL 338)

(Northern California)

IN RE: AIRPORT CAR RENTAL ANTITRUST LITIGATION

TRANS RENT-A-CAR, INC.,
Plaintiff-Appellant,

v.

THE HERTZ CORPORATION, *et al.*,
Defendants-Appellees.

[Filed Jan. 9, 1986]

ORDER

Before: CHOY, FARRIS, and BEEZER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Farris and Beezer have voted to reject the suggestion for a rehearing en banc and Judge Choy recommends rejection.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX E

GENE NELSON'S EXCERPTED DEPOSITION TESTIMONY

Q. First of all, when you met with representatives of Avis and Hertz by yourselves and agreed upon rates, those were rates that you would charge customers for renting the cars on the airport?

A. That is correct.

Q. And when you had these agreements, were they agreements to raise the rates or lower them?

A. Raise the rates.

Q. And about how many times did you have such meetings at which Hertz, Avis and National agreed to do that?

A. We probably raised our rates once a year.

B. Did you have meetings at least once a year at which you agreed to raise the rates?

A. Yes.

* * * *

Q. Was it your understanding, based on your contacts with National executives and your contracts with the franchisees of National, and your general experience, that rates were being set the same way all across the country as they were being set in San Diego?

A. Yes, that's correct. (Nelson Deposition, 107:2-108:24, 49:18-23.)

* * * *

Q. Now, Mr. Nelson, can you tell me what subjects were generally discussed at these private meetings about which you just testified between Hertz, Avis

and National which were held outside of the presence of airport officials?

A. Well, we generally spoke in terms of revenue. And to gain more revenue, to keep competition out of the terminal. Car rental competition out of the terminal.

Q. Did you ever discuss minimum guarantees at these private meetings?

A. In all instances we discussed minimum guarantees. (Nelson Deposition, 9:21-10:5.)

* * * *

Q. Can you explain to me, as clearly as you can, Mr. Nelson, how increasing the minimum would keep additional operators off the airport?

A. Using the basis of the first contract here in San Diego, we guaranteed them 750 a month or 10 percent, whichever was the greater.

This automatically caused an off airport operator trying to gain admission to the airport, to look at a base rent factor of 750 a month. And if he was a small operator it didn't take long for him to realize that he couldn't afford this.

As we raised our minimum guarantees to 2,000 a month and then 5,000 a month, this was too much of a base rate against his revenues. It would cost him in the neighborhood of 25 to 28 percent of his gross business.

Q. Now, would this increased minimums have had any effect on the actual fees paid by Hertz, Avis and National?

A. Never.

Q. Why not?

A. Well, at these meetings we compared our revenue. National being nationally known as number three

therefore having the lowest revenue factors in the terr[illegible]l, we based our increase to the minimum at a [illegible]est factor of our revenue. Therefore, we would not be penalized by paying the penalty versus 10 per cent of our gross, and we would take a factor of 12 months average, 10 months average, something of that nature, to establish amongst the three of us that it would not hurt National being penalized in the event the revenue was below the base minimum.

Q. So what you're saying, then, and correct me if I'm wrong, is that you would make sure the increase in the minimum guarantee still kept the minimum guarantee below what you felt 10 percent—

A. Correct.

* * * *

Q. Now, during these private meetings at which the minimum guarantee was discussed, did the representatives of Hertz, Avis and National agree on minimum guarantees on actual numbers?

A. Yes. (Nelson Deposition, 4:5-5:25)

* * * *

Q. In our experience in the car rental industry, was raising the minimum guarantee an effective way of keeping additional car rental operators off the airport?

* * * *

A. It was one of the methods used.

Q. Was it effective?

A. It was effective. (Nelson Deposition, 17:4-5, 16-18.)

* * * *

Q. Now, based on your contacts with the other National franchisees, was it your understanding that minimums were being raised around the country for the

purpose of keeping additional operators off the airport?

A. Very definitely. (Nelson Deposition, 29:19-23.)

* * * *

Q. Now, with respect to these statistics or other information they gave you, did they [National's home office] indicate or express any opinion or belief as to the truth or arguments?

A. Well, I challenged them on the statistics they provided me, because anyone having been in the industry for a few years and knowing the increased growth of air travel, that somewhere along the line the figures don't jibe. And when I challenged them as to the validity they said they didn't know themselves. (Nelson Deposition, 29:38-40.)

* * * *

Q. And these are the statistics that you referred to before that you questioned?

A. Yes, I questioned these statistics.

Q. Now, at the time you sent the letter to the Port Authority, what was your belief as to the validity of these statistics? Was it your belief that they were valid or invalid?

A. My belief was that they were invalid.

Q. In other words, you were making misrepresentations to the Port Authority in the letter; is that right?

A. Yes, I was making misrepresentations. (Nelson Deposition, 53:13-25.)

APPENDIX F

GEORGE AKOBOFF'S EXCERPTED DEPOSITION TESTIMONY

Q. What did you mean when you said that Hertz was always afraid of something?

A. Well, this type of meeting was held all throughout the United States in various different major cities with Hertz, Avis and National. And they didn't want—they were always afraid of the Justice Department, and they had mentioned that several times to me.

Q. What do you mean they were afraid of the Justice Department?

A. Well, that they were controlling the rates, fixing the rates.

Q. Who mentioned that to you?

A. Howard Burns [Hertz] did.

Q. How do you know that they were fixing the rates and having these meetings throughout the country?

A. Because I was a member of the licensee advisory committee and these subjects were brought up every three months. (Akoboff Deposition, 35:8-24.)

* * * *

Q. Did you and representatives of Hertz and Avis meet in this early 1969 period to discuss ways to try and block these applications of Budget, Alfa and Valcar at that time?

A. Yes. We met several times trying to figure out what to do and how to do it. And it was requested by Avis, I believe, and seconded by Hertz that we hire an independent traffic controller type agency to determine how much traffic there would be in the airport if we added on another or two rent-a-car companies.

Q. Did this traffic consultant fellow—and, by the way, was his name Dr. Fossman?

A. Dr. Fossman, correct.

Q. Did he make a report to Hertz, Avis and National?

A. Yes, he did. He was working close in hand with Dr. Dan Huntoon of Avis.

Q. What did he report?

A. Frankly, I don't remember all the things he reported.

Q. Was the bottom line that traffic controls suggested keeping these others out?

* * * *

A. His basic report as much as I can recollect was that if you added on another operator or two or three that the congestion at the airport was bad already and it would be far more worse and so on and so forth.

Q. What did you personally think of this analysis?

A. I thought it was a phony analysis. (Akoboff Deposition, 13:1-14:25).

* * * *

A. Here again, it's—in fact, there was a time when Hertz wasn't afraid of anybody. They would just come out and tell you that "if that airport manager gets shitty with us, we'll make sure that he won't get another job anyplace else," or they would send a gift to a preferred general manager of some airport through this particular gift company out of Chicago. (Akoboff Deposition, p. 61:4-11.)

* * * *

Q. Do you know whether in fact Mr. Hankey gave any parties on his yacht for airport personnel?

A. Yes. He had a small yacht. I think it was—it was a personal yacht he owned. It was paid for by the corporation, all expenses on that yacht. And he had taken Francis Fox out on the yacht for, I think, two days. And they were trying to discuss ways and means of preventing Budget Rent a Car from coming onto the airport.

Q. For the record, who was Francis Fox?

A. Francis Fox was the general manager of the Los Angeles International Airport.

* * * *

Q. Were any women brought on this yacht trip to help entertain Mr. Fox?

A. Yes.

Q. Do you know whether this type of a party including women was done on any other occasions by any of the big three for airport personnel?

A. Yes. Yes. I got a couple of girls for a couple of the managers of airport personnel. (Akoboff Deposition, pp. 23:22-24:19.)

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No. 85-1616

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

TRANS RENT-A-CAR, INC.,
Petitioner,

v.

THE HERTZ CORPORATION and
NATIONAL CAR RENTAL SYSTEM, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION*

INTRODUCTION

Petitioner, Trans Rent-A-Car, Inc., has petitioned this Court to review a decision of the Court of Appeals for the Ninth Circuit which affirmed the grant of summary judgment for respondents, The Hertz Corporation ("Hertz") and National Car Rental System, Inc. ("National"), in the only case that was left in the decade-old *Airport Car Rental Antitrust Litigation* (MDL 338). The decision below involves no conflict among courts of

* Pursuant to Rule 28.1, respondents certify that the parent company of The Hertz Corporation is UAL, Inc. and that the parent company of National Car Rental System, Inc. is Household International, Inc. Neither respondent has subsidiaries or affiliates whose disclosure is required by Rule 28.1.

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appeals and no unsettled or novel issue that merits review by this Court. It is of significance only to the parties to this one case — one plaintiff and two defendants. Moreover, even if this Court were to reject the reason set forth by the court of appeals in its opinion, the summary judgment would nevertheless have to be affirmed for reasons set forth in this Court's recent decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986).

STATEMENT

The *Airport Car Rental Antitrust Litigation* was spawned by a Federal Trade Commission complaint filed in June 1975 against Hertz, National and Avis Rent-A-Car System, Inc. ("Avis"), charging those companies with competing unfairly in connection with car rental concessions at various airports. Although the FTC proceeding was settled by consent in October 1976, early termination was not the order of the day for ensuing private actions brought by competitors of Hertz, National and Avis who claimed to have been excluded from various airport car rental concessions.

These private cases (which were consolidated in the Northern District of California as MDL 338) lingered for a number of years. As the private cases progressed, Hertz and National settled with the two largest plaintiffs, Budget Corporation and Dollar Rent-A-Car Systems, Inc., and Avis settled with all of the plaintiffs. There remained for adjudication the claims asserted against Hertz and National by (1) some 50 licensees of Budget Corporation and (2) Trans Rent-A-Car, Inc., which was a latecomer to both the car rental business and the *Airport Car Rental Antitrust Litigation*.

Trans Rent-A-Car, Inc. ("Trans"), which came into existence in 1969, had not attempted to obtain an airport car rental concession until 1972 (when it sought entry as the fourth operator at the San Diego airport but lost out

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to a Budget licensee). Trans did not intensify efforts to obtain car rental concessions at any other airport until 1974. Additionally, although most of the plaintiffs in the *Airport Car Rental Antitrust Litigation* brought suit by October 1977, Trans did not bring its action until February 1979 — more than two years after the FTC proceeding had been terminated. This procrastination by Trans precluded it from relying on the suspension of the statute of limitations that Section 5(i) of the Clayton Act, 15 U.S.C. 16(i), grants to private antitrust plaintiffs who sue within one year after termination of a government action.

Extensive discovery in MDL 338 made it clear that the essence of the claims being asserted by the private plaintiffs was that they had been damaged as a result of joint efforts by Hertz, National and Avis to persuade governmental authorities to adopt eligibility criteria and contractual requirements that had the effect of foreclosing and delaying entry by other car rental companies into the markets for on-airport car rental concessions. Using as a test case the claims of a Budget licensee with respect to airports in Washington and Oregon, Hertz and National moved for summary judgment in 1980, asserting that the plaintiffs' claims were barred by the *Noerr-Pennington* doctrine.[1]

In April 1981, Judge William W. Schwarzer of the United States District Court for the Northern District of California (to whom the *Airport Car Rental Antitrust Litigation* was assigned by the Judicial Panel on Multi-District Litigation) issued a lengthy opinion in which he ruled that the claims of the plaintiff in that test case were

---

1. The "*Noerr-Pennington*" doctrine is used to refer to this Court's decisions in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). The doctrine also includes this Court's decision in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

barred by the *Noerr-Pennington* doctrine. *In re Airport Car Rental Antitrust Litigation*, 521 F. Supp. 568 (N.D. Cal. 1981). In November 1982, the Court of Appeals for the Ninth Circuit affirmed, with an opinion that unequivocally declared that *Noerr-Pennington* protected the defendants' activities. *In re Airport Car Rental Antitrust Litigation*, 693 F.2d 84 (9th Cir. 1982). That opinion established the fundamental principle that would thereafter govern the *Airport Car Rental Antitrust Litigation*. This Court denied certiorari. 462 U.S. 1133 (1983).

Hertz and National then moved for summary judgment against the remaining plaintiffs, pointing out that, since the *Noerr-Pennington* question had already been resolved in their favor by the Ninth Circuit, the only open question was whether any of the remaining plaintiffs could somehow establish that its claims fit within the so-called "sham" exception to *Noerr-Pennington*.

After their motions for summary judgment were filed, Hertz and National settled with the Budget licensees. That left for adjudication the claim of only one plaintiff, Trans.

In support of their summary judgment motion, Hertz and National pointed out in the district court that Trans' claim was fundamentally the same as the claims of the other plaintiffs — including the plaintiff whose claim had been rejected by the earlier opinions of the district court and the court of appeals — namely a claim by a competitor that it had been excluded from on-airport car rental concessions as a result of joint efforts by Hertz, National and Avis to persuade governmental authorities to adopt restrictive eligibility criteria and contractual requirements.

While Trans tried to argue that the "sham" exception to *Noerr-Pennington* precluded summary judgment, the record before the district court showed that: (1) notwithstanding extensive discovery, Trans had not

produced any evidence whatsoever of bribery or other corruption of governmental officials at any of the airports from which it claimed to have been excluded; (2) Trans had not produced any evidence of misrepresentations by the defendants that corrupted the decision-making process; (3) Trans' complaint about joint efforts by the defendants to convince airport officials to agree to proposed concession rates or to impose minimum guarantees were complaints about matters that were plainly immunized from attack under *Noerr-Pennington* and had nothing to do with the "sham" exception; and (4) Trans lacked standing to pursue any claims based on alleged agreements among Hertz, National and Avis to raise prices to customers, since Trans would have been a beneficiary (rather than a victim) of any such price-fixing by its competitors.

In March 1984, Judge Schwarzer entered summary judgment in favor of Hertz and National, holding that Trans had "not come forward with any facts that could raise a triable issue" on the applicability of the "sham" exception to *Noerr-Pennington* (Pet. App. 17a). Once again, the court of appeals affirmed.

The initial opinion of the court of appeals in support of the affirmance of the summary judgment against Trans (July 22, 1985) said, among other things, that Trans could not rely on certain evidence contained in deposition transcripts that were not filed of record in view of the express provisions of Rule 30(f) of the Federal Rules of Civil Procedure (Pet. App. 23a). However, after Trans petitioned for rehearing, the court of appeals withdrew all reference to that technical point as a basis for its decision (Pet. App. 1a).

In its final opinion (dated October 7, 1985), the court of appeals said, *inter alia,* that certain "evidence" upon which Trans relied to show "price-fixing" had to be excluded from consideration because it was time-barred (Pet. App. 6a-7a). It is this latter ruling which Trans

challenges in its petition and which it asks this Court to review.

ARGUMENT

The court of appeals was manifestly correct in ruling that Trans' "evidence" of "price-fixing" was time-barred. The two witnesses whose testimony forms the basis of the argument that Trans advances in its petition — George Akoboff and Gene Nelson — were clearly testifying about events that were barred by the Clayton Act's four-year statute of limitations (15 U.S.C. § 15b) at the time Trans brought its suit in February 1979. The excerpt from Mr. Akoboff's testimony quoted in the appendix to Trans' petition shows, on its face, that Mr. Akoboff was testifying about something that happened in 1969 (Pet. App. 35a). And the transcript of Mr. Nelson's testimony makes it abundantly clear that Mr. Nelson was testifying about events that occurred in 1973 or earlier (See, *e.g.*, Nelson Deposition, 3:4, 73:9, 132:10-16). Since the four-year limitations period set forth in Section 4B of the Clayton Act serves to bar all claims by Trans based on events that predated February 1975, the Akoboff and Nelson testimony could not help Trans even if the testimony did show "price-fixing" and even if Trans somehow could establish standing to assert an antitrust claim based on price-fixing by its competitors.

Trans quotes an excerpt from a footnote on page 6 of the memorandum that Hertz and National filed in support of their summary judgment motion in the district court and argues that this excerpt shows that Hertz and National "specifically excluded the statute of limitations from their motion for summary judgment" (Petition 7-8). That is not so. Other portions of that very same memorandum make it clear that Hertz and National did rely in the district court on the fact that the testimony of Nelson and Akoboff (among others) related to periods of time for

which recovery was barred by the statute of limitations.[2] The excerpts quoted by Trans in its petition merely relate to the fact that the motion for summary judgment was based on the *Noerr-Pennington* doctrine. But that is not to say — and was not to say — that the defendants waived the right to rely upon the statute of limitations as a reason for rejection of Trans' attempt to call into play the "sham" exception to that doctrine.

Finally, Trans attempts to suggest in its petition that it should be given the opportunity to avoid the statutory bar by showing that the "price-fixing" was "fraudulently concealed" by the defendants. But Trans has presented nothing — to this Court or to the courts below — to support any claim of "fraudulent concealment." And, although Trans was given repeated opportunities to specify any issues on which it wanted additional discovery (Pet. App. 8a, 10a-13a), Trans made no attempt to take any additional discovery on "concealment." Moreover, Trans' claim of "concealment" relates only to the charge that Hertz, National and Avis conspired to raise prices to their retail customers. As noted earlier, Trans simply has no standing to complain about that alleged conspiracy. See this Court's March 26, 1986 opinion in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1361 n.20 ("Respondents — petitioners' competitors — suffer no harm from a conspiracy to raise prices.").

In short, the entry of summary judgment against Trans was a simple and correct application of the law.

2. For example at page 17 of their summary judgment memorandum, Hertz and National said that the "price-fixing" argument should be rejected for a number of reasons, including:

> "*Second* most of plaintiffs' vague 'evidence' of 'price-fixing' relates to a period of time prior to June 10, 1971 and, therefore, falls outside the period for which recovery is available to any of the airport car rental antitrust plaintiffs under the applicable statute of limitations."

Moreover, the decision below does not involve any conflict among courts of appeals or any unsettled or novel issue that merits elucidation by this Court, the decision being of no significance to anyone other than the one plaintiff and the two defendants in this single case. The court should permit the book to be closed on this final, non-essential, chapter of the *Airport Car Rental Antitrust Litigation*.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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